BEFORE THE STATE BOARD OF EQUALIZATION

OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
)
DAVID AND SARAH SEITZ)

Appearances:

For Appellants: Maurice H. Dolman, Attorney at Law

For Respondent: James T. Philbin, Junior Counsel

OPINION

This appeal is made pursuant to Section 18594 of the Revenue and Taxation Code from the action of the Franchise Tax Board on the protest of David and Sarah Seitz to a proposed assessment of additional personal income tax in the amount of $1,605.26 for the year 1951.

Appellants are husband and wife. Appellant David Seitz was engaged in bookmaking during the period of January 1 to October 31, 1951. Appellants filed a joint income tax return for 1951 on April 15, 1952, in which they reported gross income in the amount of $22,807.55. Incluluded on the return was an item of $9,660.00, which was denominated "Brokerage Received " This item represented the net winnings of Appellants from the bookmaking activity. The returns also listed medical expenses totaling $784.50, of which $182.07 was claimed as a deduction.

In the absence of records pertaining to the bookmaking activity, the Franchise Tax Board reconstructed the total income therefrom by a formula method which entailed an estimate of the bets lost, the addition of the aggregate amount thereof to income and the disallowance of this amount as a deduction. This computation appeared as follows on the notice of proposed assessment that was sent to the Appellants on December 21, 1956, more than four years, but less than six years after Appellants' return was filed:

"Net profit from bookmaking 1/1 through 10/31/51 per return	$9,660.00
Applicable to period 5/3/51 through 10/31/51	5,796.00
Estimated gross receipts for period 5/3 through 10/31/51 ($5,796.00 ÷ 14%)	41,400.00
Less: Applicable to period 5/3 through 10/31/51 as above	5,796.00
Additional	$35,604.00

Adjustment is made to disallow expenses paid after May 2, 1951, in accordance with the provisions of Section 17297 of the California Revenue and Taxation Code."

As recomputed by the Franchise Tax Board, the total gross income of Appellants was $58,411.55 and their adjusted gross income was $47,652.64. Upon the basis of these computations, the Franchise Tax Board concluded that the assessment was not barred by the statute of limitations and that the claimed deduction for medical expenses should be disallowed.

The sections of the Revenue and Taxation Code relied upon by the Franchise Tax Board are Section 17359 (now 17297) effective May 3, 1951, which provides that in computing net income no deduction shall be allowed to any taxpayer on any of his gross income derived from illegal gambling activities; Section 18586.1, which extends the period within which a tax may be assessed to six years after the return is filed if the taxpayer omits from gross income an amount properly includible therein which is in excess of 25 percent of the amount of gross income stated in the return; and Section 17319.3 (now 17254), which limits the deduction for medical expenses on a joint return to the amount by which the expenses exceed five percent of the aggregate adjusted gross income.

Appellants contend (1) that the notice of proposed assessment was inadequate because it referred to Section 17297 of the Revenue and Taxation Code, which was not enacted until 1955, rather than to Section 17359, (2) that Section 17359 does not prohibit the deduction of wagers lost from wagers won, (3) that the section violates the United States Constitution if it does prohibit such deductions, (4) that the assessment was barred because there was no omission from gross income but rather an overstatement of deductions and (5) that the claimed medical expenses did not exceed five percent of the adjusted gross income.

The first contention raised by Appellants has no merit. Section 17297 is substantially identical to former Section 17359. Section 17028, which was in effect at the time that Section 17297 was adopted, provides that "The provisions of this code insofar as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as restatements and continuations thereof, and not as new enactments."

In Hetzel v. Franchise Tax Board, 161 Cal. App. 2d 224, the court held that under Section 17359 the gross income of a bookmaker is the total of his winnings without exclusion of bets lost and that bets lost are not deductible from his gross income. As so construed, the court concluded that the section did not violate the Constitution of the United States.

Appellants have not contested any of the mathematical computations made by the Franchise Tax Board, and have stated expressly that they take no issue with respect to the computation by the Franchise Tax Board that their gross income was $58,411.55.

Since the gross income reported in their return was $22,807.55, it is apparent that they omitted from gross income an amount properly includible therein which was in excess of 25 percent of the amount of gross income stated in the return and therefore that the assessment was timely under Section 18586.1. Appellants did not merely overstate their deductions, as they contend. They did not even show on their return any deductions for bets lost. They failed to report the total winnings from bookmaking, which constituted gross income to them.

Since Appellants' medical expenses did not exceed five percent of the revised amount of adjusted gross income, the claimed deduction for medical expenses is precluded by Section 17319.3.

O R D E R

Pursuant to the views expressed in the Opinion of the Board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to Section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of David and Sarah Seita to a proposed assessment of additional personal income tax in the amount of $1,605.26 for the year 1951, be and the same is hereby sustained.

Done at Sacramento, California, this 13th day of December, 1960, by the State Board of Equalization.

John W. Lynch, Chairman

Richard Nevins, Member

Paul R. Leake, Member

_____, Member

_____, Member

ATTEST: Dixwell L. Pierce, Secretary